

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case No. 05CV0329JOE-SAJ

**COBB-VANTRESS, INC.'S MOTION TO DISMISS COUNTS FOUR, SIX
SEVEN, EIGHT, NINE AND TEN OF THE FIRST AMENDED COMPLAINT
OR, ALTERNATIVELY, TO STAY THE ACTION
AND INTEGRATED OPENING BRIEF IN SUPPORT**

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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Local Rule of Civil Procedure 7.1, Defendant Cobb-Vantress, Inc., joined by Tyson Foods, Inc., Tyson Poultry, Inc. and Tyson Chicken, Inc. (the “Defendants”), move the Court to enter an order dismissing Counts 4, 6, 7, 8, 9 and 10. As grounds, the Defendants state that the state common law claims asserted in Counts 4, 6 and 10 of the Complaint are precluded by Oklahoma’s statutory and regulatory programs governing the conduct at issue. With respect to the state statutory claims asserted in Counts 7, 8 and 9 of the Complaint, those claims must be dismissed due to the State Plaintiffs’ failure to exhaust available and required administrative remedies. As an alternative and/or additional form of relief, the Defendants request that this matter be referred to the Oklahoma Department of Agriculture, Food and Forestry (“ODAFF”) and the Arkansas Soil and Water Conservation Commission (“ASWCC”) under the doctrine of primary jurisdiction and this action should be stayed pending the completion of the appropriate administrative processes before such agencies.

II. DESCRIPTION OF CLAIMS ASSERTED

This action was initiated with the filing of a Complaint and First Amended Complaint herein by the State of Oklahoma, Secretary of the Environment, C. Miles Tolbert and Attorney General, W.A. Drew Edmondson on June 13, 2005, and August 19, 2005, respectively.¹ The claims raised by the State Plaintiffs arise out of agricultural practices – the use of animal manure as fertilizer – which are governed by comprehensive and well-defined regulatory regimes created by the Oklahoma and Arkansas Legislatures and enforced by ODAFF and ASWCC. The

¹ The State, Secretary Tolbert and Attorney General Edmondson are collectively referred to herein as the “State Plaintiffs” and the original Complaint and the First Amended Complaint are collectively referred to hereinafter as the “Complaint.” Unless otherwise noted, all citations to specific paragraphs or allegations of the “Complaint” shall be cited by reference to the paragraph numbers of the First Amended Complaint in which those allegations are contained.

Complaint describes the “nature of this case” and the practices upon which it is predicated as follows:

It has been, and continues to be, the Poultry Integrator Defendants’ practice to store and dispose of waste on lands within the IRW [Illinois River Watershed] – a practice that has caused injury to the IRW, including the biota, lands, waters and sediments therein.

(Complaint, ¶ 1.) The State Plaintiffs’ claim that the practices at issue are “disposal” practices, is predicated upon their assertion that the “Poultry Integrator Defendants” have “repeatedly applied” poultry waste “in amounts that are in excess of any agronomic need and are not consistent with good agricultural practices and, as such, constitutes waste disposal rather than the normal application of fertilizer.” (Complaint, ¶¶ 50-51.) Plaintiffs allege that these practices are carried out by the numerous farmers located throughout the IRW with whom the “Poultry Integrator Defendants” contract for the rearing of poultry. (Complaint, ¶¶ 32-47.) According to the State Plaintiffs, the practices of these poultry growers have resulted in “the run-off and release of large quantities of phosphorus and other hazardous substances . . . from the fields and into the waters of the IRW.” (Complaint, ¶ 52.)

Based upon these allegations, the State Plaintiffs, pursuant to various state and federal causes of action, seek compensatory and punitive damages, civil penalties, remediation and the entry of an injunction requiring the “Poultry Integrator Defendants to immediately abate their pollution-causing conduct in the IRW” (Original Complaint, Prayer, ¶ VI(3).) Most notably for purposes of this motion, the Complaint advances the following Oklahoma State law claims: Count 4 – State Law Nuisance; Count 6 – Trespass; Count 7 - Violations of the Oklahoma Agricultural Code; Count 8 – Violations of the Oklahoma Registered Poultry Feeding

Operations Act; Count 9 – Violations of the Oklahoma Administrative Code; and Count 10 – Unjust Enrichment or Restitution. *See* Complaint, ¶¶ 98-108, 119 -147.²

III. LEGAL AUTHORITY AND ARGUMENT

The State Plaintiffs’ assertion in this case of state common law claims of nuisance (Count 4), trespass (Count 6) and unjust enrichment (Count 10) constitute an improper attempt to render “unlawful,” under common law theories, conduct which is expressly authorized by state statutes. The State Plaintiffs’ Oklahoma common law claims are precluded by the existence of Oklahoma statutes directly authorizing the conduct at issue. With respect to the state statutory claims asserted in Counts 7, 8 and 10 of the Complaint, the State Plaintiffs have failed to exhaust the administrative remedies available before ODAFF. Moreover, the conduct and issues upon which this entire action is predicated upon have been legislatively entrusted to regulatory agencies in Arkansas and Oklahoma. ODAFF and ASWCC possess the technical expertise and specialized knowledge and experience necessary to resolve these issues. Accordingly, any state law claims not dismissed by this Court should be referred to ODAFF and ASWCC for their consideration and this action should be stayed until such time as those agencies have fully addressed the claims of the State Plaintiffs through appropriate administrative proceedings.

A. **The State Common Law Claims of Nuisance, Trespass and Unjust Enrichment are Precluded by Oklahoma’s Litter Application Laws and Regulations (Counts 4, 6 and 10)**

Contrary to the impression the State Plaintiffs tried to convey in the Complaint, the utilization of poultry litter as fertilizer in Oklahoma, in general and in the IRW specifically, is not unlawful. In fact, the Oklahoma Legislature has passed legislation which specifically authorizes and regulates the utilization of poultry litter as fertilizer. *See* OKLA. STAT., tit. 2 § 10-

² These claims are referred to collectively hereinafter as the “State Law Claims.”

9.1 *et seq.* (the “Oklahoma Registered Poultry Feeding Operations Act”); and OKLA. STAT., tit. 2 § 9-201 *et seq.* (the “Oklahoma Concentrated Animal Feeding Operations Act”). Under these statutes, ODAFF has promulgated detailed and specific regulations defining what constitutes acceptable and unacceptable land application practices with respect to poultry litter. *See* OAC § 35:17-5-1 *et seq.*; and OAC § 35:17-3-1 *et seq.* Since the subject matter of this lawsuit – land application of poultry litter – is permitted and codified in the Oklahoma statutes and regulations, potential liability must necessarily be measured by these specific statutory and regulatory provisions rather than the amorphous common law standards which have been supplanted by these legislative and regulatory pronouncements.

It was long ago recognized by the Supreme Court of Oklahoma that activities sanctioned by the Oklahoma Legislature cannot amount to actionable, tortious conduct.

[W]hen the Legislature allows or directs that to be done which would otherwise be a nuisance, it must be presumed that the Legislature is the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law.

E.I. du Pont de Nemours Powder Co. v. Dodson, 150 P. 1085, 1087 (Okla. 1915). *See also*, *Sharp v. 251st Street Landfill, Inc.*, 810 P.2d 1270, 1274 n.4 (Okla. 1991) and OKLA. STAT., tit. 50 § 4 (“Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”) In the present case, the State Plaintiffs seek to impose civil liability for the land application of poultry litter as fertilizer in the IRW. These activities are expressly authorized by Oklahoma statutes. *See* 2 OKLA. STAT. § 10-9.1 *et seq.* (Oklahoma Registered Poultry Feeding Operations Act) and 2 OKLA. STAT. § 9-200 *et seq.* (Oklahoma Concentrated Animal Feeding Operations Act). The State Plaintiffs have not alleged that the Oklahoma Registered Poultry Feeding Operations Act or the Oklahoma Concentrated Animal Feeding Operations Act or the implementing regulations adopted pursuant to those two acts are

“unwholesome and unreasonable laws” which must give way to the amorphous standards of state common law nuisance, trespass and unjust enrichment. Consequently, those state common law claims must yield to the specific will of the legislature as embodied in the Oklahoma Registered Poultry Feeding Operations Act or the Oklahoma Concentrated Animal Feeding Operations Act.

If the State Plaintiffs can indeed prove violations of those statutory provisions as alleged in the Complaint, then they may be entitled to relief (albeit not from these Defendants).³ However, the State Plaintiffs are not entitled to double up in their claims by including state common law causes of action in hopes of preserving an alternative means of recovery in the likely event that it is determined that the conduct at issue is in full compliance with the Oklahoma Registered Poultry Feeding Operations Act and the Oklahoma Concentrated Animal Feeding Operations Act. Accordingly, Counts 4, 6 and 10 should be dismissed.

B. The State Plaintiffs Have Failed to Exhaust Administrative Remedies (Counts 7, 8 and 9)

In the present action, the State Plaintiffs seek, under several of their causes of action, to obtain findings or relief which, under Oklahoma law, must be first adjudicated through the administrative process available at the ODAFF.

1. The State Plaintiffs Must Exhaust Available Administrative Remedies

Administrative remedies must be exhausted before a party resorts to seeking relief from a court. *See McCarthy v. Madigan*, 503 U.S. 140, 144-145 (1992); *see also Rocky Mountain Oil and Gas Assoc. v. Watt*, 696 F.2d 743, 743 (10th Cir. 1992), *Massengale v. Okl. Bd. of Examiners*

³ Although the Complaint includes general allegations that the provisions of these statutes have been violated, the State Plaintiffs have failed to allege any specific violation by any of the Poultry Integrators or the poultry farmers with whom they contract. The Defendants doubt that the State Plaintiffs have evidence of any actual violation of these statutes by either the Defendants or the poultry farmers with whom the Defendants contract.

in Opto., 30 F.3d 1325, 1328 (10th Cir. 1994). The exhaustion doctrine is well recognized under Oklahoma law and provides that “exhaustion of administrative remedies is generally a prerequisite for resort to the courts.” *Arbuckle Abstract Co. v. Scott*, 1998 OK 125, 975 P.2d 879, 886 (Okla. 1998). The exhaustion doctrine is intended to ensure that “an administrative officer clothed with the duty of regulatory authority . . . is empowered in the first instance to interpret the provision of the statutory scheme it is duty-bound to administer.” *Id.* at 886. Not only must administrative remedies be initiated, they must be “pursued to their final outcome before judicial intervention is sought.” *April v. City of Broken Arrow*, 775 P.2d 1347, 1355 (Okla. 1989). *See also Harline v. Drug Enforcement Admin.*, 148 F.3d 1199 (10th Cir. 1998) (holding that finality of agency decision is “central to the requisite grant of subject matter jurisdiction”) and *Rocky Mountain*, 696 F.2d at 743 (finding that “the courts ordinarily should not interfere with an agency until it has completed its actions”).

The purposes of the exhaustion doctrine are multiple. The rule is one of “orderly procedure” and compliance with it allows “administrative bodies to perform their statutory functions free from premature and unnecessary interference by preliminary court litigation.” *Arbuckle*, 975 P.2d at 886 (relying on *Speaker v. Board of County Comm’rs*, 312 P.2d 438, 441 (Okla. 1957)). Using the administrative process where applicable also increases judicial efficiency by allowing the agency to produce a useful record, especially in a technical, factual context. *See McCarthy*, 503 U.S. at 145 (relying on *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975)). Failure to exhaust administrative remedies and, therefore, failure to allow the agency to make a factual record, to exercise its discretion, or to apply its expertise, could actually hinder judicial review. *See Rocky Mountain*, 696 F.2d at 743 (citing *McKart v. United States*, 395 U.S. 185 (1969)). Additionally, “frequent and deliberate flouting of the administrative process may

weaken the effectiveness of an agency by encouraging people to ignore its procedures.” *Ledbetter v. Alcoholic Beverage Laws Enforcement*, 764 P.2d 172, 180 (1988) (citing *Martin v. Harrah Indep. Sch. Dist.*, 543 P.2d 1370, 1374 (Okla. 1975)).

2. The State Plaintiffs Have Failed to Exhaust Administrative Remedies for Alleged Violations of the Oklahoma Agricultural Code

In Count 7 of the Complaint, the State Plaintiffs seek “injunctive relief” and the “assessment of civil penalties” against the Defendants for pollution through “poultry waste disposal practices” which they contend “constitute a violation of 2 OKLA. STAT. § 2-18.1.” (Complaint, ¶¶ 131-32.) The provision upon which this claim rests is part of the Oklahoma Agricultural Code, and the specific provision cited by the State Plaintiffs reads, in pertinent part, as follows:

If the State Board of Agriculture finds that any of the air, land or waters of the state which are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food and Forestry pursuant to the Oklahoma Environmental Quality Act have been or are being polluted, *the Board shall* make an order requiring that the pollution cease within a time period determined, by the Department, or require a manner of treatment or of disposition of the waste or other polluting material *as may in the judgment of the Board be necessary* to prevent further pollution. In addition, *the Board may assess an administrative penalty* pursuant to Section 2-18 of Title 2 of the Oklahoma Statutes.

OKLA. STAT., tit. 2 § 2-18.1(B) (emphasis added). Section 2-18.1’s requirement of action by the State Board of Agriculture in the context of agriculture-related pollution complaints is an explicit recognition by the Oklahoma Legislature of the specific, yet broad delegation of authority made to the Oklahoma Department of Agriculture in this area. Under Oklahoma law, ODAFF is responsible for the “utilization and enforcement of Oklahoma Water Quality Standards and

implementation documents.” OKLA. STAT., tit. 27A § 1-3-101(D)(1)(h).⁴ Moreover, the Oklahoma Legislature specifically charged this agency with the oversight and regulation of “nonpoint source runoff from agricultural crop production, agricultural services, livestock production, silviculture, feed yards, livestock markets and *animal waste*.” OKLA. STAT., tit. 27A § 1-3-101 (D)(1)(a) (emphasis added).

Under the Oklahoma Agricultural Code, ODAFF (and not the courts) has been entrusted with the responsibility for determining, at least in the first instance, whether persons subject to its jurisdiction have violated the Code or its implementing regulations. OKLA. STAT., tit. 2 § 2-18(A). In addition, the Oklahoma Legislature has determined that “the Board shall have the authority to assess an administrative penalty . . . for each violation.” *Id.* To facilitate this process, the ODAFF has the authority to “appoint hearing officers to conduct the hearings.” OKLA. STAT., tit. 2 § 2-18(B).

Curiously, the State Plaintiffs acknowledge in their Complaint, that “the Poultry Integrator Defendants are subject to the jurisdiction of the Oklahoma Department of Agriculture, Food and Forestry” (Complaint, ¶ 131), yet they have failed or refused to exhaust the

⁴ ODAFF has embraced this area of responsibility as evidenced by the following statement included by it in the implementing regulations enacted in recognition of the legislature’s charge:

The Oklahoma Department of Agriculture through statutory authority and the adoption and enforcement of rules maintains water quality in the areas of jurisdiction where beneficial uses are supported. This is accomplished by removing the threat to water quality where beneficial uses would be in danger of not being supported. In cases where beneficial uses are not being met, remedial action will be implemented to restore the beneficial use of the water. . . . The Oklahoma Department of Agriculture [Water Quality Standards Implementation Plan] will evolve to future changes in the Oklahoma Water Quality Standards and implementation criteria of the standards.

OAC § 35:45-1-6.

administrative process available before ODAFF for resolving their claimed violations of the statutes and regulations which that agency is statutorily charged to implement and enforce. Whatever the reason for the State Plaintiffs' flouting of the administrative process, it is inappropriate, at least with respect to their claims asserting violations of the Oklahoma Agricultural Code. Those claims must be addressed, at least initially, in a proceeding before ODAFF. Because the State Plaintiffs have failed to initiate, let alone exhaust, the administrative process with ODAFF, Count 7 of the Complaint should be dismissed.

3. The State Plaintiffs Have Failed to Exhaust Administrative Remedies for Alleged Violations of the Oklahoma Registered Poultry Feeding Operations Act

In Count 8, the State Plaintiffs request "an assessment of civil penalties . . . pursuant to 2 OKLA. STAT. § 10-9.11 [The Oklahoma Registered Poultry Feeding Operations Act]." (Complaint, ¶ 136.) The State Plaintiffs further seek an order compelling "compliance with the Animal Waste Management Plan Criteria set forth in Oklahoma Registered Poultry Feeding Operations Act, OKLA. STAT., tit. 2 § 10-9.7, and with the Oklahoma Administrative Code, § 35:17-5-5 [the implementing regulations under the Act]" (Complaint, ¶ 136.)

Under the Oklahoma Registered Poultry Feeding Operations Act, ODAFF has the authority in the first instance to determine whether a violation has occurred and to assess an appropriate administrative penalty. *Compare* OKLA. STAT., tit. 2 § 10-9.11(B)(1) (the "State Department of Agriculture may assess administrative penalties") *with* OKLA. STAT., tit. 2 § 10-9.11(C)(1) (the Attorney General may bring an action "for recovery of any administrative penalty *assessed*"). In recognition of its responsibility to resolve complaints alleging violations of Oklahoma's animal waste management laws, ODAFF has established procedures governing the submission, handling and adjudication of such complaints. OAC § 35:17-5-9.

ODAFF has not assessed any penalties against the Defendants relating to the subject matter of the State Plaintiffs' Complaint, nor do the State Plaintiffs allege otherwise. *See generally* Complaint. In fact, no complaint has been filed with or investigation initiated by ODAFF pertaining to the State Plaintiffs' claims that the Defendants have violated any provision of the Oklahoma Registered Poultry Feeding Operations Act and, once again, the State Plaintiffs do not allege otherwise. *See generally* Complaint. If indeed the State Plaintiffs have information suggesting that the Defendants have violated the Oklahoma Registered Poultry Feeding Operation Act, then they are required under the statute to file a complaint with ODAFF alleging such violations and to exhaust that agency's administrative process before proceeding to Court to recover administrative penalties which have not even been assessed by the agency as required by law. The complaint procedure before ODAFF is not merely an optional or alternative step to enforcing the Act. Rather, "the resolution of a complaint is the completion of the appropriate administrative, jurisdictional and legal remedies" OAC § 35:17-5-9. Because the State Plaintiffs have failed to initiate, let alone exhaust, their administrative process with ODAFF, Count 8 of the Complaint should be dismissed.

4. The State Plaintiffs Have Failed to Exhaust Administrative Remedies for Alleged Violations of the Oklahoma Concentrated Animal Feeding Operations Act

In Count 9, the State Plaintiffs request an "assessment of civil penalties . . . pursuant to 2 Okla. Stat. § 9-212 [The Oklahoma Concentrated Animal Feeding Operations Act]" and an order compelling "compliance with the Animal Waste Management Plan Criteria set forth in Oklahoma Administrative Code § 35:17-3-14 [the implementing regulations under the Act]." (Complaint, ¶ 139.)

Under the Oklahoma Concentrated Animal Feeding Operations Act, it is ODAFF that possesses the authority to determine compliance and non-compliance with the Act and its implementing regulations. ODAFF has the authority to receive complaints alleging non-compliance with the Act and to conduct hearings on such complaints. OKLA. STAT., tit. 2 § 9-212.1(B), (D). If ODAFF determines at such a hearing that a violation of the Act or the implementing regulations has occurred, **it** has the authority to assess “administrative penalties” and to issue an order either prohibiting land application of wastes for a period of time or compelling compliance with the Act. OKLA. STAT., tit. 2 § 9-212.1(D). The complaint procedure before ODAFF is not merely an optional or alternative step to enforcing the Act. Rather, “the resolution of a complaint is the completion of the appropriate administrative, jurisdictional and legal remedies” OAC § 35:17-3-23. Because the State Plaintiffs have failed to initiate, let alone exhaust, their administrative process with ODAFF, Count 9 of the Complaint should be dismissed.

C. Primary Jurisdiction of ODAFF and ASWCC (Counts 4, 6, 7, 8, 9 and 10)

Whether cast as alleged violations of the duly enacted agricultural statutes or common law claims for nuisance, trespass or unjust enrichment, each and every state law claim being advanced by the State Plaintiffs is premised upon the assertion that the Defendants (or more technically the poultry farmers with whom they contract in the IRW) have used poultry litter in a manner that is unreasonable or imprudent from either an agricultural or environmental perspective. This issue is one that has been legislatively entrusted to regulatory agencies in Arkansas and Oklahoma. ODAFF and ASWCC possess the technical expertise and specialized knowledge and experience necessary to resolve such claims. Accordingly, in the event that this Court chooses not to dismiss one or more of the state law claims asserted in Counts 4, 6, 7, 8, 9 or 10 of the Complaint, such claims should be referred to ODAFF and ASWCC for their

consideration and this action should be stayed until such time as those agencies have fully addressed the claims of the State Plaintiffs through appropriate administrative proceedings.⁵

The doctrine of primary jurisdiction recognizes that not every claim cognizable in a court of law ought to be decided by a court of law. To the contrary, the United States Supreme Court has held that the doctrine of primary jurisdiction mandates that a court not decide claims that “require the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.” *Int’l Bd. of Boilermakers v. Hardeman*, 401 U.S. 233, 238 (1971) (quoting *U.S. v. Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956)). The primary jurisdiction doctrine serves to protect the integrity of regulatory schemes and to ensure that those agencies charged with regulating the subject matter involved in disputes are not improperly passed over by the litigants and the judicial process. *U.S. v. Philadelphia Nat’l Bank*, 374 U.S. 321, 353 (1963); *Far East Conf. v. U.S.*, 342 U.S. 570, 574 (1952).

The application of the primary jurisdiction doctrine to the present case is appropriate because decisions regarding acceptable agricultural practices and the regulation of the hundreds

⁵ Defendants request dual referral to ODAFF and ASWCC because the IRW and the contract growers whose practices are being challenged in the complaint are found both in Oklahoma and Arkansas. (See Complaint, ¶ 22 and Ex. 1 to Complaint (showing boundaries of IRW)). Although the Complaint seeks to apply Oklahoma statutes and common law upon practices occurring within Arkansas, such a result is clearly contrary to well-settled law that a state’s law can have no extraterritorial effect. *Watson v. Employer Liab. Assur. Co.*, 348 U.S. 66 (1954) (“any attempt to control persons or things beyond such boundaries is ineffective and void for want of power and violates the due process clause of the XIVth Amendment to the Constitution of the United States.”) See also, Tyson Foods, Inc.’s Mot. to Dismiss § IV(B) (filed contemporaneous with this motion). Arkansas has its own poultry litter management laws. Enforcement and implementation of those laws is within the jurisdiction of ASWCC. Accordingly, ASWCC has primary jurisdiction over claims of improper animal waste management practices occurring in the Arkansas portion of the IRW.

of geographically dispersed farmers or users of poultry litter in the cross-boundary IRW have been entrusted to ODAFF and ASWCC through a comprehensive series of legislative enactments. Pursuant to this legislation, ODAFF and ASWCC have promulgated extensive regulations detailing in technical terms those agricultural and environmental practices that the two respective states require of persons making use of poultry litter. The present lawsuit improperly disregards the specialized expertise and the statutory jurisdiction that ODAFF and ASWCC have over matters pertaining to the agricultural and environmental practices of the industry which those agencies are charged with regulating.

1. ODAFF Jurisdiction Over Land Application of Poultry Litter in Oklahoma

Under Oklahoma law, ODAFF (not the Attorney General or Secretary Tolbert) has been charged with “environmental responsibility” over poultry litter and possible water quality impacts associated with the use of poultry litter as fertilizer. *See generally* OKLA. STAT., tit. 27A § 1-3-101(1)(a) (charging ODAFF with the oversight and regulation of “nonpoint source runoff from agricultural crop production, agricultural services, livestock production, silviculture, feed yards, livestock markets and *animal waste*.” (emphasis added)) Through the Oklahoma Concentrated Animal Feeding Operations Act, OKLA. STAT., tit. 2 § 9-201 *et seq.* and the Oklahoma Registered Poultry Feeding Operations Act, OKLA. STAT., tit. 2 § 10-9.1 *et seq.*, ODAFF has the responsibility of requiring poultry growers to have an approved “Animal Waste Management Plan” incorporating “Best Management Practices” developed by ODAFF for the proper utilization of poultry litter. *See* OKLA. STAT., tit. 2 § 10-9.7; and OKLA. STAT., tit. 2 § 9-205.3. ODAFF has promulgated an extensive set of regulations identifying those agricultural practices which are acceptable and prohibiting those practices which the Oklahoma Legislature or ODAFF have determined present an undue environmental risk. ODAFF’s regulations

regarding acceptable poultry litter management practices address issues as technical and far ranging as:

- the “rate” or amount of poultry litter that can applied to the land based upon a Phosphorus Index tool which takes into account factors such as the topography of the land, distance to water bodies, existing soil nutrient levels, and nutrient content of the litter being applied (OAC § 35:17-5-5(a)(6) and 35:17-3-14(b)(3)(K));
- acceptable and unacceptable locations for poultry litter to be applied (OAC § 35:17-3-14(b)(3)(H) and (L));
- the laboratory testing of soil and litter contents required prior to land application of litter as fertilizer (OAC § 35:17-5-5(a)(6);
- weather conditions during which litter should not be land applied (OAC § 35:17-5-5(a)(7)(B) and 35:17-3-14(b)(3)(B));
- the manner in which poultry litter may be stored prior to land application (OAC § 35:17-5-5(a)(7)(A) and 35:17-3-14(b)(3)(E));
- the necessity of grass buffer zones between poultry litter application sites and water courses to filter eroded soil which may contain poultry waste. (OAC § 35:17-5-5(a)(6).

ODAFF’s expressed purpose for these rules is to:

. . . serve to control nonpoint source runoff and discharges from poultry waste application of poultry feeding operations. These rules allow for the monitoring of poultry waste application to land or removal from these operations and assist in *ensuring beneficial use of poultry waste while preventing adverse effects to the waters of the state of Oklahoma.*

OAC § 35:17-5-1 (emphasis added) As explained earlier in this brief, the Oklahoma Legislature has given ODAFF the authority to investigate farm-related pollution complaints and to determine compliance of agricultural practices with applicable Oklahoma law.

In the Complaint, the State Plaintiffs allege both past and present violations of the Oklahoma Concentrated Animal Feeding Operations Act, the Oklahoma Registered Poultry Act and the Oklahoma Agricultural Code. Under the statutory and regulatory scheme in place in Oklahoma, these claims should be brought, if at all, in a proceeding before ODAFF which has

both statutory jurisdiction over the subject matter of this action and the specialized technical expertise required to efficiently resolve issues relating to the practices of the industry which it regulates. Therefore, the Court should refer the State Plaintiffs' Complaint to ODAFF for a determination of the extent to which, if at all, the acts and/or omissions of the Defendants or the poultry farmers with whom they contract in the IRW constitute violations of the poultry litter management laws administered by ODAFF. In the event ODAFF determines, after appropriate administrative proceedings, that the Defendants have violated the provisions of any law which it administers, then ODAFF should determine the nature and extent of appropriate relief for such violations. The present action should be stayed until such time as appropriate administrative proceedings before ODAFF have been concluded.

2. ASWCC Jurisdiction Over Land Application of Poultry Litter in Arkansas

Under the statutory and regulatory framework in place in Arkansas, ASWCC is the agency entrusted with responsibility for the agriculturally and environmentally sound use of poultry litter. The jurisdiction and role of ASWCC in monitoring and addressing complaints about alleged farm-related "pollution" by Arkansas poultry growers is very similar to the jurisdiction and role of ODAFF with respect to Oklahoma poultry growers.

In Arkansas, the agriculturally and environmentally acceptable practices around the utilization of poultry litter as a fertilizer are established, monitored and governed by three different legislative acts – the Arkansas Poultry Feeding Operations Registration Act, ARK. CODE ANN. § 15-20-901 *et seq.*; the Arkansas Soil Nutrient Management Planner and Applicator Certification Act, ARK. CODE ANN. § 15-20-1001 *et. seq.* and the Arkansas Soil Nutrient Application and Poultry Litter Utilization Act. ARK. CODE ANN. § 15-20-1101 *et seq.* These acts and the regulations promulgated thereunder create a regulatory framework which is similar to

that in Oklahoma.⁶ ASWCC is the agency designated with the responsibility for implementing and enforcing each of these three Acts.

The provisions of the three Arkansas Acts closely resemble in many respects the provisions of Oklahoma Concentrated Animal Feeding Operations Act and the Oklahoma Registered Poultry Feeding Operations Act. Arkansas poultry growers, like their counterparts in Oklahoma, must have a state-approved “Poultry Litter Management Plan” incorporating state-developed “Best Management Practices” governing the appropriate use of poultry litter on their farms. *See* ARK. CODE ANN. § 15-20-1108. Like ODAFF has done in Oklahoma, ASWCC has promulgated rules delineating those agricultural practices by Arkansas growers and others which are considered acceptable and prohibiting those practices which the legislature or ASWCC has determined present an undue environmental risk. ASWCC’s regulations regarding acceptable poultry litter management practices cover:

- the “rate” or amount of poultry litter that can be applied to the land based upon a Phosphorus Index tool which takes into account factors such as the topography of the land, distance to water bodies, existing soil nutrient levels, and nutrient content of the poultry litter being applied (ASWCC REGS., Title XXII, Sections 2201.4(B), 2202.3(B), 2202.4 and 2204.5);
- the laboratory testing of soil and litter contents required prior to land application of litter as fertilizer (ASWCC REGS., Title XXII, Sections 2202.5(B) and (C) and 2203.3(B)(5));
- weather conditions during which litter should not be land applied (ASWCC REGS., Title XXII, Section 2202.4(C));

⁶ In many instances, the Arkansas laws and regulations are even more comprehensive and environmentally protective than those currently in place in Oklahoma. The Arkansas laws and regulations reach all nutrient applications including both animal wastes and commercial fertilizer; whereas the Oklahoma laws only apply to nutrients from animal wastes used as fertilizer. *See* ASWCC REGS., Title XXII, Section 2201.4(M). Also, the Oklahoma laws only govern the use of poultry litter by poultry growers. Those laws do not apply to use of litter by cattlemen and other third parties who frequently purchase litter from poultry growers. The Arkansas laws govern the use of litter by all persons and not just poultry growers. *Compare* ASWCC REGS., Title XXII, Sections 2201.4(T) *with* OKLA. STAT., tit. 2 § 10-9.7(A).

- the manner in which poultry litter may be stored prior to land application (ASWCC REGS., Title XXII, Section 2204.2(B)(8));
- record-keeping requirements that poultry growers must follow with respect to sales or transfers of litter to third parties (ASWCC REGS., Title XIX, Section 1902.3(A)(10));
- record-keeping requirements for poultry litter applicators reflecting the location, amount and rate of litter applications (ASWCC REGS., Title XXI, Section 2105.1).

Like ODAFF, ASWCC has also been charged with the responsibility of investigating the conduct of poultry growers with respect to the handling and utilization of poultry litter and, where necessary, determining the extent of any penalty or remedy necessary in instances of non-compliance. ASWCC has been empowered to initiate its own investigations and to adjudicate complaints by others regarding litter management practices. *See* ASWCC REGS., Title XIX, Section 1903.2; Title XX, Section 2006.2; Title XXI, Section 2107.2; and Title XXII, Section 2206.1 (detailing ASWCC complaint procedures). The authority to assess penalties for improper application of litter in Arkansas has also been granted to ASWCC. *See* ARK. CODE ANN. § § 15-20-905, 15-20-1008 and 15-20-1112. Finally, under Arkansas law, determining the necessity of “corrective action” and fashioning the parameters of injunctive relief is a matter left to the discretion of ASWCC. *See* ASWCC REGS., Title XX, Section 2006.2; Title XXI, Section 2107.2; and Title XXII, Section 2206.1 (providing that ASWCC is obligated to review all evidence submitted to it in any complaint by a third party and to specify any “resulting corrective action” required to be undertaken by the regulated parties in order to address the subject of such complaints.)

As is demonstrated above, ASWCC is uniquely situated to address, and in fact has the statutory authority to address, the type of claims being advanced by the State Plaintiffs in this case arising out of any operations or activities in Arkansas. In addition to its statutory

jurisdiction over these matters, ASWCC, having spent years evaluating litter use practices and developing state approved litter use standards, possesses the specialized technical expertise required to efficiently resolve the issues raised in this action. Therefore, the Court should refer the State Plaintiffs' Complaint to ASWCC for a determination of the extent to which, if at all, the acts and/or omissions of the Defendants or the poultry farmers with whom they contract in the IRW constitute violations of any poultry litter management law administered by ASWCC. In the event ASWCC determines, after appropriate administrative proceedings, that such violations exist, then ASWCC should determine the nature and extent of appropriate relief for such violations under applicable Arkansas law. The present action should be stayed until such time as appropriate administrative proceedings before ASWCC have been concluded.

3. The Primary Jurisdiction Doctrine Mandates the Stay or Dismissal of the Present Action in Deference to the Administrative Processes Available before ODAFF and ASWCC

The doctrine of primary jurisdiction “exists for the proper distribution of power between judicial and administrative bodies and not for convenience of the parties.” 2 FED.PROC.L.ED. § 2:320 (1994) (citations omitted). Consideration of this doctrine is necessary when the claims presented involve matters over which the courts and administrative agencies have concurrent jurisdiction. Jaffe, *Primary Jurisdiction*, 77 HARV. L. REV. 1037, 1038 (1964). Numerous courts have recognized that one such area where concurrent jurisdiction typically exists and where primary jurisdiction is appropriately considered is in the area of environmental regulation

and litigation.⁷ Environmental issues inherently involve complex social, economic and technological problems for which the legislatures at both the state and federal levels have requested the development of comprehensive programs and regulations by highly specialized and technical administrative agencies. When litigants ask a court to disrupt these programs by substituting its interpretation of highly technical rules and regulations promulgated by the agencies or, worse yet, by fashioning and enforcing an entirely different set of standards for the regulated conduct, tension between court action and the statutory jurisdiction of administrative agencies inevitably arises.

No fixed formula constrains a court's exercise of its discretion to invoke the doctrine as the determination is largely fact-specific. *Bradford Sch. Bus Transit v. Chicago Transit Auth.*, 537 F.2d 943, 949 (7th Cir. 1976). However, many courts, including the Tenth Circuit Court of Appeals, have recognized the following circumstances as supporting judicial abstention under the doctrine of primary jurisdiction:

- (1) the issues raised in the case are not within the conventional experience of judges or are better suited to the technical expertise possessed by an administrative agency;
- (2) the issues raised require the exercise of administrative discretion around policy directives which the agencies are charged by legislatures to fulfill;

⁷ See, e.g., *Schwartzman v. Atchison Topeka & Santa Fe Railway Co.*, 857 F. Supp. 838 (N.M. 1994) (applying the primary jurisdiction doctrine to stay litigation of claims requesting abatement and remediation of pollution under common law nuisance theories and referring such matters to the EPA and New Mexico Environmental Department); *Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333 (D. N.M. 1995) (applying the primary jurisdiction doctrine in the context of a lawsuit alleging water pollution from mining operations extensively regulated by the New Mexico Department of Environment); *South Lake Worth Inlet Dist. v. Town of Ocean Ridge*, 633 So. 2d 79 (Fla. App. 1994) (applying the primary jurisdiction in a lawsuit seeking to abate a public nuisance allegedly created by a sand transfer plant which was closely regulated by the Florida Department of Natural Resources); and *Davies v. Nat'l Coop Refinery Ass'n*, 963 F. Supp. 990 (D. Kan. 1997) (applying the primary jurisdiction doctrine to claims premised in waste disposal practices already regulated by the Kansas Environmental Protection Agency).

(3) the litigation potentially threatens the required uniformity and consistency in the regulation of the business entrusted to a particular agency; and

(4) the litigation seeks injunctive or remedial relief which requires scientific and technical expertise possessed by a particular agency.

See Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1377 (10th Cir. 1989); *U.S. v. Zweifel*, 508 F.2d 1150, 1156 (10th Cir. 1975). While each factor should be considered, no single factor is conclusive and the final allocation of jurisdiction to an agency depends on the scope of the agency's expertise and whether agency action promotes uniformity. *U.S. v. Western Pac. R.R. Co.*, 352 U.S. 59, 64 (1956).

The industry involved in this lawsuit and the practices being questioned – the frequency, amount and location of the appropriate use of poultry litter as fertilizer – are the subjects of extensive legislative enactments and regulatory programs administered by ODAFF and ASWCC. In Counts 4, 6, 7, 8, 9 and 10 of the Complaint, the State Plaintiffs ask this Court to find that the conduct of hundreds of differently-situated farmers spread throughout the 1,069,530 acres of the IRW in Arkansas and Oklahoma are improper and unreasonable. The adjudication of such claims inherently will involve a consideration of the highly-technical and site-specific “litter utilization standards” or “Animal Waste Management Plan Criteria” developed and regulated by ODAFF and ASWCC. Any attempt by the State Plaintiffs to bypass these agencies on these matters would usurp the powers and authority clearly reserved to ODAFF and ASWCC by the legislatures of Oklahoma and Arkansas.

ODAFF and ASWCC, and their technical staffs, have the advantage of having already carefully considered and studied the issues surrounding what constitutes appropriate litter utilization in these transboundary watersheds. Based upon this process, both agencies promulgated detailed rules regarding “litter application rates” and “Best Management Practices” to be followed by the poultry growers in these two respective states. While the Arkansas and

Oklahoma rules differ somewhat, the litter application standards developed by both agencies are to be applied on a field-by-field basis to poultry growers under Animal Waste or Nutrient Management Plans approved by these agencies for the use of poultry growers in the IRW. A determination of which of the hundreds of litter applications by hundreds of differently-situated landowners that make use of litter in the IRW are acceptable or reasonable and which are not, are matters that go beyond the conventional expertise of a court but are well within the scope of expertise possessed by ODAFF and ASWCC. These two agencies have the technical personnel, direct experience and expertise to evaluate the myriad of factors that bear upon the reasonableness of the practices being challenged such as: (1) the composition of the soil on which litter is being applied, (2) the nature and concentration of the various substances found in litter and the interaction between those substances and the soil, (3) the solubility of substances found in litter, (4) the risk of run-off from litter applications depending upon the slope of the terrain, the extent of vegetation and the distance to the nearest water body, (5) the effectiveness of run-off control measures used by individual landowners such as riparian buffer zones, and (6) the adequacy of litter storage methods and facilities to minimize leaching or run-off of poultry litter or its constituents. With all due respect to this Court, these issues, which are at the core of the State Plaintiffs' claims in Counts 4, 6, 7, 8, 9 and 10 of the Complaint, are issues which are more appropriately suited for determination by agencies such as ODAFF and ASWCC.

In addition, the need for consistency and uniformity in the regulation of agricultural practices weighs heavily in favor of referring this matter to the ODAFF and ASWCC. The poultry farmers who contract with the Defendants are already subject to complex and comprehensive regulations promulgated by ODAFF and ASWCC which purport to define their legal obligations with respect to the management and application of poultry litter. Through this

litigation, the State Plaintiffs seek to impose yet another set of “standards” – in this case judge-made standards – defining acceptable and unacceptable litter management and application practices. If the State Plaintiffs obtain the relief they are seeking in this case, any uniformity or consistency in the regulatory framework established by the legislatures in Arkansas and Oklahoma will be destroyed and the Defendants, poultry farmers and others in the IRW will be in the position of having to consider and choose between three different “standards” governing the same conduct. In this situation, the following comments made by a New Mexico court in considering a primary jurisdiction motion in a similar case provide sound guidance to the Court in the case at bar:

It would be improper for this Court to exercise its equitable jurisdiction to interfere with the comprehensive programs designed to solve a complex social, economic and technological problem. Quite simply, the Court chooses not to pollute the scene with still more studies and standards.

State ex. rel. Norvell v. Arizona Pub. Serv. Co., 85 N.M. 165, 172, 510 P.2d 98, 105 (1973).

The need for this Court to apply the primary jurisdiction doctrine in this case is magnified greatly by the injunctive and remedial relief sought by the State Plaintiffs. The State Plaintiffs are seeking a “permanent injunction requiring each and all of the Poultry Integrator Defendants to immediately abate their pollution-causing conduct, to remediate the IRW . . . and to take all such action as may be necessary to abate the immediate and substantial endangerment to the health and the environment” (Complaint, Prayer, ¶ VI(3).) Courts have uniformly recognized that deference to agencies under the primary jurisdiction doctrine is particularly warranted where the lawsuit seeks to regulate through injunctive relief conduct which the

legislatures have tasked the relevant agencies with evaluating and controlling.⁸ The State Plaintiffs' request for injunctive relief begs obvious questions which should be answered by ODAFF and ASWCC rather than this Court; questions such as:

- What type, amount or location of litter applications, if any, are "causing pollution" and, therefore, need to be enjoined?
- Is there an immediate and substantial endangerment to the health and the environment and, if so, what actions are necessary to abate the endangerment?
- What type of remediation actions, if any, are necessary in the IRW?

Here again, these are issues which are more appropriately suited for determination by agencies such as ODAFF and ASWCC.

Simply put, all of the traditional factors considered in evaluating referral under the primary jurisdiction weigh heavily in favor of the Court referring Counts 4, 6, 7, 8, 9 and 10 of the Complaint to ODAFF and ASWCC and staying this action pending the outcome of appropriate administrative proceedings before those agencies.

IV. CONCLUSION

For the foregoing reasons, the Defendants request that this Court dismiss the state law claims asserted in Counts 4, 6, 7, 8, 9 and 10 of the Complaint. In the event that this Court chooses not to dismiss one or more of the state law claims asserted in Counts 4, 6, 7, 8, 9 or 10 of the Complaint, such claims should be referred to ODAFF and ASWCC for their consideration and this action should be stayed until such time as those agencies have fully addressed the claims

⁸ See, e.g., *Schwartzman, Inc. v. Atchison, Topeka & Santa Fe Railway Co.*, 857 F. Supp. 838, 843 (N.M. 1994) (the doctrine is "more readily applicable" where "injunctive relief is called for, requiring scientific or technical expertise"); *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991) (plaintiff avoided application of primary jurisdiction doctrine only by dropping claim for injunctive relief); *O'Hare v. Valley Utilities, Inc.*, 547 P.2d 1147 (N.M. Ct. App. 1975) (injunctive relief is "identical to the relief which the agency could have granted" and therefore primary jurisdiction lies with the agency) *rev'd in part on other grounds*, 550 P.2d 274 (N.M. 1976).

of the State Plaintiffs through appropriate administrative proceedings.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of October 2005, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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